

3-1-2006

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Recommended Citation

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TREATING RELIGION AS SPEECH: JUSTICE STEVENS'S RELIGION CLAUSE JURISPRUDENCE

*Eduardo Moisés Peñalver**

INTRODUCTION

Justice Stevens has sometimes been caricatured as the U.S. Supreme Court Justice who hates religion. Whether considering questions under the Establishment Clause or the Free Exercise Clause, questions about the funding or regulation of religious groups, or the permissibility of religious speech in public places, in case after case he has voted against religion. Like most caricatures, this view of Justice Stevens is based on a kernel of truth. He does appear to be more likely to vote against religious groups than any other Justice. But an exploration of the cases in which Justice Stevens has voted in favor of religious claimants reveals that, rather than being moved by a reflexive hostility toward religion, he appears to respect religion as a powerful motivator of human action that is largely protected by the political process. Religion's power makes it a singularly divisive category of human activity and makes religious favoritism a uniquely seductive temptation that the conscientious legislator (and judge) must carefully avoid. Although Justice Stevens may take this respectful apprehension of religion too far, his views are a far cry from the sort of blatant hostility of which he is often accused.

In Part I, I lay out the standard case for Justice Stevens's hostility towards religion. I then challenge the soundness of that view in Part II by discussing the various cases in which Justice Stevens has voted in favor of religious claimants. In Part III, I attempt to formulate a principle that ties Justice Stevens's various religion votes together, a principle that I characterize as "respectful apprehension." Notwithstanding my rejection of the common view of Justice Stevens as hostile to religion, I argue in Part IV that there are substantial problems with Justice Stevens's actual approach. First, Justice Stevens has a tendency to treat religion as no more valuable than other valuable categories of expressive activity, a tendency that brings him into agreement with a great deal of recent scholarly commentary on the religion clauses, but which I think is ultimately mistaken. The protection he would afford religious practice is therefore largely coextensive with the protection afforded to expressive conduct more generally under the First Amendment. Second, I argue that Justice Stevens places too much faith in

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the ability of legislatures to look out for the interests of minority religious groups, ignoring the important role that courts play in signaling to legislatures situations in which minority religions appear to be suffering disproportionately under generally applicable regulations. Accordingly, in Part V, I propose a different approach, one that builds on Justice Stevens's views but that more adequately acknowledges the unique value of religion in the lives of believers.

I. THE CASE FOR JUSTICE STEVENS'S HOSTILITY TOWARD RELIGION

As religion clause scholars have noted, religion jurisprudence tends to come in prepackaged bundles of views. Douglas Laycock divides the universe of religion cases into three broad categories: cases concerning funding for religious organizations, cases concerning sponsorship of religion and religious speech in public places, and cases concerning the regulation of religious practice.¹ According to Laycock, the most conservative three Justices, Antonin Scalia, Clarence Thomas, and former Chief Justice William H. Rehnquist, have consistently voted to permit funding for religion and to protect religious speech, even by the government.² In contrast, the most liberal four Justices, Stevens, David H. Souter, Ruth Bader Ginsburg, and Stephen G. Breyer, have consistently voted to prohibit religious funding and often to prohibit religious speech in public fora.³ On questions of protection of religious groups against government regulation, the roles have typically, though not as consistently, been reversed, with the more liberal Justices favoring broader protection of religious groups from government regulation, and the more conservative Justices favoring narrower protection.⁴

Each of these two bundles of positions is broadly coherent. Conservatives, as a general matter, appear willing to entrust the legal status of religion to the political process. They would empower the majority to a significant degree to determine the scope and content of both governmental religious expression and government regulation of religious groups. In the run of Establishment Clause cases, this tendency works in favor of religious litigants who in those cases generally represent (at least local) majority faiths. In free exercise cases, however, it tends to work against religious claimants, who in those cases are typically minority religions. Liberals, in contrast, appear to be suspicious of political control over government's relationship with religion. This tendency generally works against religious

1. See Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155, 156 (2004).

2. See *id.* at 157.

3. See *id.* Justices Sandra Day O'Connor and Anthony Kennedy typically acted as swing votes on both issues. See *id.*

4. See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1009-10 (1990).

groups in Establishment Clause cases but in favor of religions claimants in the context of free exercise challenges to overbearing state action.

As is so often the case, Justice Stevens's position in this area is unique. He tends to side with the more liberal justices on Establishment Clause questions, favoring broad judicial invalidation of both public funding of religion and public religious expression, but usually votes with the more conservative justices in rejecting free exercise-based claims for exemption of religious groups from government regulation. On the establishment side, he has been as reliable a vote as any against funding of religion and public religious expression.⁵ In fact, he has gone farther than most. Notably, he was alone in arguing that the Religious Freedom Restoration Act amounted to an unconstitutional establishment of religion.⁶

In contrast to his usual compatriots in the establishment arena, Stevens is a staunch supporter of the Court's increasingly narrow free exercise jurisprudence. He has rarely found a free exercise claim that he liked, no matter how trivial the cost to government.⁷ He joined the majority in *Employment Division v. Smith*⁸ in concluding that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."⁹ Indeed, it is fair to call Stevens the father of *Smith*, since the heart of the *Smith* test is drawn directly out of Justice Stevens's concurring opinion in *United States v. Lee*.¹⁰ Accordingly, for Justice Stevens, more than for any other Justice, the "religious" side in religion clause cases often finds itself on the short end of the stick.¹¹

Scholars have struggled to formulate a principle that might tie together the two halves of Justice Stevens's unique take on the religion clauses. Unable to come up with one, some have concluded that "[t]he apparent explanation for this voting pattern is hostility to religion. Religion in his view is subject to all the burdens of government, but entitled to few of the benefits."¹²

For those of us who know and admire Justice Stevens, the notion that his religion jurisprudence is based on sheer hostility is hard to stomach. From my personal experience as his clerk, I know Justice Stevens to be one of the

5. See, e.g., *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819, 863 (1995) (Souter, Stevens, Ginsburg, Breyer, J.J., dissenting); *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (Brennan, Marshall, Blackmun, Stevens, J.J., dissenting).

6. See *City of Boerne v. Flores*, 521 U.S. 507, 536-37 (1997) (Stevens, J., concurring).

7. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503 (1986) (voting to uphold refusal of the U.S. Air Force to permit an Orthodox Jew to wear a yarmulke).

8. 494 U.S. 872 (1990).

9. *Id.* at 879 (internal quotation omitted).

10. 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring).

11. Justices David H. Souter and Stephen G. Breyer have called for the reconsideration of *Smith*, while Justice Ruth Bader Ginsburg has yet to reveal her position on the question. See *City of Boerne*, 521 U.S. at 565 (Souter, J., dissenting); *id.* at 566 (Breyer, J., dissenting).

12. Laycock, *supra* note 4, at 1010.

most fair-minded and tolerant people I have ever met. Even the most casual acquaintance with his jurisprudence will be struck by its thoughtfulness and subtlety. It is therefore worth exploring Justice Stevens's religion votes in a bit more detail. By focusing particular attention on the admittedly infrequent cases in which Justice Stevens has voted in favor of religious groups, we can generate a more complete picture of the conceptual underpinnings of his religion jurisprudence. What emerges is a complex view of the proper relationship between the state and religious groups, one that cannot be dismissed as rooted in mere hostility.

II. JUSTICE STEVENS'S VOTES IN FAVOR OF RELIGIOUS GROUPS

Despite the characterization of Justice Stevens as hostile to religious groups, he has voted in favor of religious organizations in a number of significant cases, reflecting a wide array of factual scenarios: state funding for religious believers, regulation of religious practice, internal church governance, and religious speech.

A. *State Funding for Religious Believers*

Justice Stevens has voted with the majority in a series of decisions in which the Court blocked the state from refusing unemployment benefits to people who had lost their jobs as a result of their religious beliefs. In *Thomas v. Review Board*,¹³ the Court built on its decision in *Sherbert v. Verner*,¹⁴ and held that a religiously motivated pacifist was entitled to unemployment benefits when he left his job after being transferred to a department of his company that manufactured tank turrets. "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith," the Court held in *Thomas*, "or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."¹⁵ Over a dissent by Justice Rehnquist, the Court rejected the state's arguments that this burden was justified by the state interest in limiting unemployment and discouraging employers from inquiring into potential employees' religious beliefs.¹⁶ In *Hobbie v. Unemployment Appeals Commission*,¹⁷ Justice Stevens again joined the Court in expanding the *Sherbert* line of cases, again over a Rehnquist dissent, this time by applying it to a recent convert. Finally, in *Frazee v. Illinois Department of Social Security*,¹⁸ Justice Stevens voted to extend the *Sherbert* line of cases to cover a claimant whose refusal to work

13. 450 U.S. 707 (1981).

14. 374 U.S. 398 (1963).

15. *Thomas*, 450 U.S. at 717-18.

16. *See id.* at 718-19.

17. 480 U.S. 136 (1987).

18. 489 U.S. 829 (1989).

on the Sabbath was not based on membership in an organized religious group but rather on “personal professed religious belief.”¹⁹

The *Sherbert* cases arose under the Free Exercise Clause, but Justice Stevens has also sided with religious claimants against states raising the Establishment Clause as a reason for denying them funding. In *Witters v. Washington Department of Services for the Blind*,²⁰ the Court rejected the state’s arguments that it could not fund the plaintiff to study “the Bible, ethics, speech, and church administration in order to equip himself for a career as a pastor, missionary, or youth director.”²¹ Washington State, which provided aid for education of the blind, denied Witters the requested assistance because, in its view, granting the aid would violate state and federal constitutional prohibitions on assistance to religion. With Justice Stevens in the majority, the Court reversed, holding that the provision of aid to Witters, who was then free to use it to pursue whatever course of study he chose, did not constitute an impermissible direct subsidy of religion. “Any aid provided under Washington’s program that ultimately flows to religious institutions,” the Court explained, “does so only as a result of the genuinely independent and private choices of aid recipients.”²²

B. Regulation of Religious Practice

Justice Stevens has also voted in favor of religious claimants in several cases concerning the regulation of religious practice. He voted with the rest of the Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,²³ to overturn a city ordinance prohibiting the ritual killing of animals. Although the statute was written in facially neutral terms, the Court concluded that it was in fact specifically aimed at suppressing the animal sacrifices central to the practice of the Santeria religion.²⁴ As a consequence, it constituted an invalid infringement on free exercise rights.²⁵ Justice Stevens also sided with a Baptist minister prohibited by Tennessee law from seeking state office.²⁶ Finally, in an interesting inversion of his concurring opinion in *City of Boerne*, Justice Stevens voted with a unanimous court in *Cutter v. Wilkinson*²⁷ to uphold the portions of the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) having to do with prisoners against an Establishment Clause challenge.

19. *Id.* at 831 (quoting *Frazee v. Ill. Dep’t of Soc. Sec.*, 512 N.E.2d 789, 790 (Ill. App. Ct. 1987)).

20. 474 U.S. 481 (1986).

21. *Id.* at 483.

22. *Id.* at 487.

23. 508 U.S. 520 (1993).

24. *See id.* at 534.

25. *See id.* at 542-47.

26. *See* *McDaniel v. Paty*, 435 U.S. 618 (1978).

27. 125 S. Ct. 2113 (2005).

C. Internal Church Governance

Justice Stevens has also voted to exempt religious groups from government regulation that touches on questions of internal church relations. In *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, Justice Stevens voted with the majority to reject an establishment challenge to Title VII's exemption of religious organizations from prohibitions against religious discrimination in employment as applied to a nonprofit gymnasium run in Salt Lake City by the defendant, the Mormon Church.²⁸ He also voted with the majority in *NLRB v. Catholic Bishop of Chicago*,²⁹ construing the National Labor Relations Act ("NLRA") as excluding parochial school teachers from its protection, in part because applying the NLRA to Catholic schoolteachers would raise serious First Amendment questions.

D. Religious Speakers

Finally, in a series of cases, Justice Stevens has voted to protect the rights of religious groups or individuals to engage in proselytizing speech in public places. In *Heffron v. International Society for Krishna Consciousness, Inc.* ("ISKCON"),³⁰ he joined Justices William J. Brennan, Jr., and Thurgood Marshall in dissenting in part from a decision upholding a rule confining ISKCON members (along with all others seeking to distribute printed materials) to enclosed booths at the Minnesota state fair.³¹ Because the rule permitted those visiting the fair freely to "give speeches, engage in face-to-face advocacy, campaign, or proselytize," the dissenters argued, it violated ISKCON's First Amendment speech rights for the state not to allow ISKCON's members to hand out the group's literature while roaming through the crowd.³² Similarly, in *Lamb's Chapel v. Center Moriches Union Free School District*,³³ Justice Stevens voted with the majority in holding that the defendant school district could not open its facilities to after-hours activities by private groups but exclude groups engaging in speech from a religious point of view. Finally, in *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*,³⁴ Justice Stevens, writing for the Court, reasoned that an ordinance requiring individuals to obtain a permit before engaging in door-to-door advocacy violated their speech rights. The ordinance in the case allowed residents to prevent solicitation even by licensed solicitors by filling out a form with the

28. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

29. 440 U.S. 490 (1979).

30. 452 U.S. 640 (1981).

31. *Id.* at 656 (Brennan, J., dissenting in part).

32. *Id.* at 658.

33. 508 U.S. 384 (1993).

34. 536 U.S. 150 (2002).

town's mayor.³⁵ In his opinion, Justice Stevens favorably quoted passages from earlier cases lauding the importance of door-to-door religious canvassing, noting that "[t]his form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits."³⁶

III. TYING STEVENS'S RELIGION VOTES TOGETHER: RESPECTFUL APPREHENSION

Focusing on the many cases in which Justice Stevens has voted in favor of religious claimants makes it far more difficult to attribute his decisions to simple hostility to religion. His votes in these cases suggest that Justice Stevens does not harbor ill will towards religious speech, but, on the contrary, views religious speakers as engaged in core activity protected by the First Amendment.³⁷ Indeed, his careful policing of the prerogatives of internal church governance indicates a commitment to church autonomy, even in the face of important countervailing social values. Finally, his occasional willingness to deviate from his general preference to read the Establishment Clause expansively and the Free Exercise Clause narrowly demonstrates that something other than hostility must be at work. What emerges from this collection of votes is a view of religion as an important, but dangerous, category of behavior that is, for the most part, able to fend for itself in the political process. Judicial intervention in defense of religion is therefore appropriate, on Justice Stevens's view, principally in situations in which the Court thinks it likely that a religious group (or believer) is being unfairly singled out for unequal treatment or where some sub-category of religious groups (or believers) are particularly vulnerable to state coercion.

As Professor Christopher Eisgruber notes in his contribution to this Symposium, Justice Stevens has found the greatest merit in free exercise cases where religious believers have suffered uniquely unfavorable treatment at the hands of the state.³⁸ In his opinion in *Hobbie v. Unemployment Appeals Commission*, concurring in the judgment, Justice Stevens explained that judicially enforced free exercise relief was necessary in the *Sherbert* line of cases to protect religious believers against "unequal treatment."³⁹ If the state permits workers discharged for other reasons to

35. See *id.* at 156. Interestingly, each of the forms contained nineteen suggested categories of canvassers who could be excluded, one of which was "Jehovah's Witnesses." *Id.* at 157 n.6.

36. *Id.* at 161 (quoting *Murdock v. Pennsylvania*, 319 U.S. 105, 108-09 (1943)).

37. When he has voted against religious speakers in this context, it has been because he has had doubts about the scope of the forum in which they are seeking to speak. See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 130 (2001) (Stevens, J., dissenting).

38. Christopher L. Eisgruber, *Justice Stevens, Religious Freedom, and the Value of Equal Membership*, 74 Fordham L. Rev. 2177 (2006); see also *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring).

39. *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring).

receive unemployment benefits, Justice Stevens suggested, it should treat sincerely held religious beliefs no less favorably.⁴⁰ His vote in *Lukumi* falls squarely within this antidiscrimination principle.⁴¹

Conversely, when the state has conferred special, though narrowly tailored, benefits on religious groups (or believers) that are, for some particular reason, uniquely vulnerable, Justice Stevens has declined to find Establishment Clause violations. Thus, while in *Zelman v. Simmons-Harris*,⁴² he argued in stark terms that issuing vouchers to parents that could be used for public schools would violate the Establishment Clause, in *Witters* he joined a decision holding that a grant of similar assistance to a blind student seeking to study for the ministry would not.⁴³ Similarly, in his concurring opinion in *City of Boerne*, he argued that the Religious Freedom Restoration Act's grant of heightened protection to all religious groups violated the Establishment Clause,⁴⁴ whereas in *Cutter* he joined an opinion upholding a very similar grant of heightened protection for prisoners under the RLUIPA.⁴⁵

Justice Stevens's votes in *Witters* and *Cutter* appear to be united by a concern with the uniquely vulnerable nature of the claimants in the two cases: the blind and the imprisoned. The focus of the provisions in question on those two vulnerable categories both justified the state's effective subsidization of religion and provided a limiting principle that ensured that the subsidies would not become a generalized state support for religion. In contrast, in *Zelman* and *City of Boerne*, the benefits conferred on religious groups swept so broadly that Justice Stevens may have concluded that they were impermissible attempts to grant favored status to religious groups as a whole, including those in no special need of protection.

In sum, Justice Stevens's votes in favor of religious claimants undermine the view that he is hostile to religion. Instead, a fair review of his voting record suggests that, while he is extremely sensitive to the potentially divisive effects of religious differences, particularly when mingled with the power of the state, he respects religion as an important sphere of human endeavor. Moreover, although he is generally optimistic about the ability of religious groups (or believers) to protect themselves in the democratic political process, he is sensitive to the possibility that at times that process will fall short. As a consequence, he is willing to provide judicial protection to religious claimants, including exempting religious groups from regulation, when legislatures appear to have singled out a religious claimant for adverse treatment. In addition, he appears to be willing to give

40. *See id.*

41. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *see also supra* notes 23-25 and accompanying text.

42. 536 U.S. 639 (2002).

43. *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986).

44. *See City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (Stevens, J., concurring).

45. *See Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005).

legislative bodies some leeway to grant exemptions to religious subgroups that are uniquely vulnerable in some way.

IV. SOME PROBLEMS WITH JUSTICE STEVENS'S VIEW OF RELIGION

Although Justice Stevens's religion jurisprudence is more substantial and principled than the caricatured view of him held by some commentators, there are still substantial problems with his approach. First, at times it seems that, for Justice Stevens, the value of religion reduces in large part to its status as a form of constitutionally protected speech or expression, as important as, say, political speech, but no more so. But by reducing the value of religion to its status as speech or expression, Justice Stevens misses the singular role played by religion within the human experience. Moreover (and relatedly), treating religion as uniquely divisive without recognizing the need for strong judicial protection of religious minorities causes Justice Stevens's religion clause jurisprudence to veer too far in the direction of unfettered majoritarianism.

A. *Religion and Speech*

It is probably no coincidence that many of the cases in which Justice Stevens has voted in favor of religious groups have been brought under the rubric of freedom of speech, and not freedom of religion.⁴⁶ As Professor Gregory P. Magarian observes in his contribution to this Symposium, Justice Stevens is a strong, though pragmatic, believer in the judicial maintenance of robust public discourse fed and watered by constitutionally protected speech.⁴⁷ As I noted above, Justice Stevens has said that he considers religious speech to constitute core speech essential to the maintenance of such vibrant public discourse. And it is indeed the case that a great deal of religiously motivated behavior takes the form of speech. Accordingly, strong protection of speech inevitably redounds to the benefit of religious speakers.

But the analogy between the protections afforded speech and religion in the modern free exercise jurisprudence (which largely tracks Justice Stevens's views) goes beyond the very real and obvious overlap between religion and speech that occurs when the speech in question is in fact religious. Justice Stevens's (and, since *Smith*, the Court's) treatment of the regulation of religious conduct has for the most part extended to religiously motivated conduct the same meager protections afforded by the Speech Clause against incidental burdens on other forms of expressive conduct.⁴⁸

46. See, e.g., *Watchtower Bible & Tract Soc'y v. Vill. of Stratton*, 536 U.S. 150 (2002); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981).

47. Gregory P. Magarian, *The Pragmatic Populism of Justice Stevens's Free Speech Jurisprudence*, 74 *Fordham L. Rev.* 2201 (2006).

48. Indeed, one might argue that, at least as a matter of formal doctrine, expressive conduct receives greater protection against incidental burdens under the Speech Clause of the First Amendment than religious conduct does under the Free Exercise Clause. Compare

Broadly speaking, under both the Speech and Free Exercise Clauses, the government may incidentally burden expressive or religious conduct, as long the burdens result from the application of neutral laws of general applicability that do not themselves discriminate among points of view.⁴⁹ Under this approach, even the most trivial government interests can justify nondiscriminatory government action that incidentally imposes extremely severe burdens on religious practice.⁵⁰ In other words, when the treatment of religious exemptions and expressive conduct are juxtaposed, it appears that the constitutional protection of expressive conduct serves as both a ceiling and a floor for the protection of religious exercise, a state of affairs that makes the Free Exercise Clause's protections of religious conduct from government regulation seem more or less superfluous.

This observation is likely to be relatively untroubling for many scholars, particularly those who have argued in recent years that religion is in fact not entitled to special status when it comes to constitutionally mandated exemptions from government regulation. Perhaps most prominently, Professor Eisgruber and Professor Lawrence Sager have argued that religiously motivated activity is not entitled to exemptions from general government regulation that are not also afforded to analogous conscientiously, though secularly, motivated conduct.⁵¹ Religion, they argue, although certainly valuable to its members, is not necessarily more valuable than any number of strongly held secular commitments.⁵² Moreover, it is not intrinsically more valuable or useful to society as a whole.⁵³ Accordingly, it should not be singled out for privileged status within a constitutional doctrine of expression.

Eisgruber and Sager posit the hypothetical of Vincent, a man who is utterly committed to the pursuit of his art.⁵⁴ Vincent's commitments appear

United States v. O'Brien, 391 U.S. 367, 377 (1968) ("[G]overnment regulation [of expressive conduct] is . . . justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."), with *Employment Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990) ("[G]enerally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest . . .").

49. See Note, *Making Sense of Hybrid Speech: A New Model for Commercial Speech and Expressive Conduct*, 118 Harv. L. Rev. 2836, 2852 (2005) (observing that, while regulations that incidentally burden expressive conduct are subject to a form of intermediate scrutiny, they are never invalidated).

50. See, e.g., *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

51. See Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. Chi. L. Rev. 1245, 1254-60 (1994); see also Stephen G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. Pitt. L. Rev. 75 (1990); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. Pa. L. Rev. 149 (1991); Steven D. Smith, *What Does Religion Have to Do with Freedom of Conscience?*, 76 U. Colo. L. Rev. 911 (2005).

52. See Eisgruber & Sager, *supra* note 51, at 1264.

53. See *id.* at 1265-67.

54. See *id.* at 1255.

to be every bit as powerful as those of religious believers, but the strength of his commitment does not entitle him to exemptions from generally applicable laws; they argue:

Vincent is not entitled to an economic structure that permits him to prosper; Vincent is not entitled to collect unemployment insurance if he is by virtue of his passion unavailable for work; Vincent is not entitled to consume peyote even if, like Coleridge, he does his best work in an altered state of consciousness; Vincent is not entitled to bring toxic paints vital to the full realization of his artistic vision into his locality in the face of local environmental laws prohibiting their possession and use.⁵⁵

Eisgruber and Sager argue that the advocate of privileging religiously motivated conduct (over other sorts of conduct) cannot point to anything that would justify treating such conduct more favorably than, say, conduct motivated by a deep commitment to art, or justice, or philosophy.⁵⁶

A number of scholars have taken up the challenge. My colleague Professor Abner Greene, for example, has argued that the uniquely inaccessible nature of religious reasoning justifies treating the category of religiously motivated conduct differently than conduct motivated by reasons for acting whose merits can be debated according to generally accepted standards of rationality.⁵⁷ In a similar vein, Judge Michael McConnell has argued that, in contrast to the other sorts of deep commitments mentioned by Eisgruber and Sager, religion is unique in its tendency to present itself to believers as an obligation imposed not as a matter of individual autonomy but rather a command from God.⁵⁸ Unlike McConnell's religious believer, Victor is likely to acknowledge that his deep commitment to art is largely a matter of subjective preference and choice; if he is honest, he may even concede that his commitment to art is largely arbitrary, a matter of happenstance that is not binding in any general sense on others who do not share his particular constellation of preferences and talents.

In addition to its tendency to present its tenets as binding commands, religions differ from other types of human commitments in another fundamental respect: the sorts of questions they address.⁵⁹ Religious beliefs address themselves to the most fundamental, irreducible questions of human meaning. This orientation towards the ultimate in turn leads religious belief systems to be uniquely all encompassing in the demands they place on believers.⁶⁰ Although a deep secular commitment can

55. *See id.*

56. *See id.* at 1262.

57. *See, e.g.,* Abner S. Greene, *Is Religion Special? A Rejoinder to Scott Idleman*, 1994 U. Ill. L. Rev. 535, 537-39.

58. *See* Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DePaul L. Rev. 1, 28 (2000).

59. *See* Eduardo Peñalver, Note, *The Concept of Religion*, 107 Yale L.J. 791, 819-20 (1997).

60. *See* Marci A. Hamilton, *God vs. the Gavel: Religion and the Rule of Law* 294 (2005) (arguing that religious belief systems are uniquely comprehensive in scope).

virtually always be conjoined with other deep secular commitments or even with certain religious commitments, the uniquely comprehensive nature of religious commitments means that they typically cannot be conjoined with one another.

Taking up the example of Victor posited by Eisgruber and Sager, we can imagine Victor's deep commitment to art cohabiting with any number of other deep commitments. Victor, or someone like him, might be fully committed to the pursuit of both his art and of pleasure, of both art and justice, or, indeed, of both art and Christianity. But it would make absolutely no sense to talk about Victor as fully committed to both Christianity and Islam, or to both Judaism and Santeria.

It is precisely this comprehensive nature that makes religious systems so valuable to their adherents. Religious systems typically have something decisive to say to believers about every facet of human existence: the meaning of life and death; the existence of evil, adversity, and suffering; and the best way to coordinate and structure virtually every deep commitment to which the believer applies herself. Religious systems are therefore uniquely capable of comprehensively ordering, and conferring sustained meaning upon, the lives of believers.⁶¹ Their singularly all-encompassing, meaning-conferring nature makes religious systems particularly valuable to believers and renders legal interference with their operation problematic in a way that is unlike the harm inflicted by interfering with other sorts of expressive conduct. In failing to treat religiously motivated behavior as fundamentally distinct in kind from other forms of expressive conduct, Justice Stevens's (and the Court's) free exercise jurisprudence fails to give due regard to religion's unique nature and to the singular value of religious commitments.

B. *The Need for Robust Judicial Protection of Religious Minorities*

Eisgruber and Sager (and Justice Stevens) might well concede the limited distinctiveness of religion along, say, the lines suggested by Greene and McConnell. The lesson they would draw from the epistemological isolation of religion, however, is that religious groups, particularly minority religious groups, are uniquely vulnerable, but not necessarily valuable.⁶² Nevertheless, their willingness to concede that religious beliefs and practices may be particularly vulnerable suggests that they are open to the exemption of some religious practices from generally applicable regulations. But grounding such an entitlement in the vulnerability of religion, rather than its value, leads them towards a fundamentally different orientation in considering the merits of exemption claims, one that places antidiscrimination concerns at center stage.⁶³

61. See Peñalver, *supra* note 59, at 806-07.

62. See Eisgruber & Sager, *supra* note 51, at 1248.

63. See *id.* at 1248, 1283.

Although Justice Stevens has not explicitly rested his exemptions jurisprudence on the vulnerability of religious belief, in the exemptions context his preoccupation with regulations that single out or discriminate against particular religious groups suggests that he would likely be sympathetic to the logic of Eisgruber and Sager's explanation. After all, the recognition of the potentially oppressive power of religious faction that runs so strongly through his Establishment Clause jurisprudence implicitly contains within itself a concern for the effects of that power on religious (and secular) dissenters. Danger and vulnerability are, in this context, two sides of the same coin.

Although he appears willing to acknowledge the vulnerability of religious minorities, Justice Stevens also seems to place a great deal of faith in the ability of the democratic process in most instances to strike the correct balance between regulation and exemption of religious practices. Accordingly, his inclination is to leave the creation of exemptions to the political process absent evidence that a religious group has been singled out for unequal treatment.⁶⁴

Eisgruber and Sager try to assuage fears about the ability of majoritarian political processes to safeguard the interests of minority religious groups. They point towards a series of infamous free exercise cases in which minority groups were turned away by the courts only to be granted the relief they sought by the legislatures. In *Lyng*, *Lee*, *Goldman*, and *Smith*, the judiciary failed to protect the interests of Jews, Native Americans, and the Amish.⁶⁵ In the wake of each of those decisions, however, the legislatures intervened to safeguard the threatened religious practices.⁶⁶ Even assuming *arguendo* that religion is entitled to certain exemptions from generally applicable laws, the argument goes, courts have demonstrated that they are not the best entities to enforce such a privilege and that legislatures are well positioned and have proved willing to take into consideration the interests of religious groups.

In a similar vein, scholars have sometimes looked at the legislature's demonstrated tendency to grant relief where courts have failed to do so to denigrate the substantive benefits for religious groups of the more

64. Commitment to the notion that religious systems are uniquely valuable does not necessarily entail rejecting Justice John Paul Stevens's opposition to judicially crafted exemptions from legal regulation for religious groups. Professor Marci Hamilton, for example, concedes that religious systems are uniquely all-encompassing systems of thought that play unique roles in the lives of believers. See Hamilton, *supra* note 60, at 294-95. But, for reasons having to do with what she calls "rule of law," she argues that exemptions from generally applicable regulations should be left to legislatures and not the courts. See *id.* at 297.

65. See *Employment Div. v. Smith*, 494 U.S. 872 (1990); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *Goldman v. Weinberger*, 475 U.S. 503 (1986); *United States v. Lee*, 455 U.S. 252 (1982).

66. See 10 U.S.C. § 774 (2000) (granting the relief sought in *Goldman*); 26 U.S.C. § 3121(w) (2000) (granting the relief sought in *Lee*); Or. Rev. Stat. § 475.992(5) (2003) (granting the exemption sought in *Smith*); H.R. Rep. No. 100-713, at 72 (1988) (overturning *Lyng*).

permissive, pre-*Smith* free exercise standard. Although courts claimed to be imposing strict scrutiny, they say, religious claimants almost never prevailed. Empirical evidence suggests, however, that the Court's doctrinal shift in *Smith* substantially reduced the willingness of lower courts to grant relief to minority religious groups seeking relief from burdensome regulations. Prior to *Smith*, the requested exemptions were granted in nearly forty percent of the cases; after *Smith*, this dropped to under thirty percent.⁶⁷

Despite the mixed track record of courts at protecting religious minorities, the structure of the four examples cited by Eisgruber and Sager demonstrates, as they acknowledge, the important signaling function played by lawsuits seeking exemptions from general regulations.⁶⁸ In each of the four examples, the legislature first enacted a generally applicable rule that did not include exemptions for religious communities for whom those regulations constituted substantial burdens. The communities responded by resorting to the courts for assistance. When judicial relief was not forthcoming, legislatures, alerted to the attention of the conflict by the judicial decision itself, responded by exempting the groups from the regulation in question.⁶⁹

This dialog between legislatures and the courts is threatened when courts adopt an excessively pinched understanding of the Free Exercise Clause. When courts overtly signal to believers that they are not a sympathetic forum, as they have since *Smith*, their ability to bring the existence of disproportionate burdens placed by generally applicable laws on minority religious groups to the attention of the legislature is compromised. Unsurprisingly, in the years after *Smith*, the number of free exercise challenges brought by religious groups dropped by over half.⁷⁰

In other words, while there is some room for optimism about the willingness of legislatures to protect the interests of minority religious groups, the story is a complicated one in which both courts and legislatures play crucial roles. When combined with an acknowledgement of religion's unique value, the evidence of judicial behavior appears to favor a free exercise jurisprudence that empowers courts to grant requested relief when appropriate while leaving room for legislative involvement as a backstop for situations in which, as is often the case, judges are overly tentative in their consideration of requests for exemptions. Removing either piece of the mechanism leaves minority religious groups substantially under protected.

67. See Amy Adamczyk et al., *Religious Regulation and the Courts: Documenting the Effects of Smith and RFRA*, 46 J. Church & St. 237, 248-51 (2004). Interestingly, before *Smith*, courts appeared to be markedly majoritarian in their decision making, ruling in favor of mainline groups at a higher rate than they did in favor of minority groups. See *id.* at 245-48.

68. See Eisgruber & Sager, *supra* note 51, at 1306.

69. See *supra* note 66 and accompanying text.

70. See Adamczyk et al., *supra* note 67, at 251.

V. RELIGION AS SIMULTANEOUSLY VULNERABLE, VALUABLE, AND DANGEROUS

Just as the potential danger of religious majorities run amok implies the unique vulnerability of religious minorities, an argument can also be made that both the danger and vulnerability of religion are inseparable from religion's unique value. On this view, the special danger posed by religion (and consequently the unique vulnerability of religious groups) can itself be seen as flowing from the same features of religious thought that make it uniquely valuable to human beings. The result is a view of religion as uniquely, and simultaneously, valuable, vulnerable, and dangerous. Such a view would in turn create the imperative for a religion clause jurisprudence that adequately takes account of all three of these features.

The argument that religion must be, at once, vulnerable, valuable, and dangerous goes something like this: The ultimate nature of the questions addressed by religious belief systems, and the marked tendency of such systems to be all encompassing, is precisely what gives rise to the typical failure of those systems at critical moments to adhere to generally accepted rules for rational discourse. Religions virtually always focus on fundamental "why" questions, questions about ultimate meaning, the answers to which are normally, and very self-consciously, grounded in explanations that are beyond the reach of human reason. Religions deal in faith and mystery. The abiding appeal of religious systems suggests a deep human longing for answers to questions that human reason cannot resolve. Far from being a reproach, non-rationality is therefore an unavoidable consequence of the unique subject matter of religious questions.

Similarly, the sorts of questions to which religion is typically addressed, and the nonrational nature of the answers it typically supplies, helps to explain the experience of obligation on which McConnell focuses. In light of its comprehensive, self-referential, and, consequently, nonrational orientation, religious belief is normally transmitted through means that are plainly inconsistent with notions of autonomous choice. The two principal methods through which religious faith is formed, inculcation and conversion, illustrate this phenomenon. Both are fundamentally unchosen experiences. Children are authoritatively trained from birth into the patterns of thought and idiosyncratic logic of particular religious systems. For its part, religious conversion is, in its paradigmatic forms, a fundamental change of orientation experienced by the believer as the recognition of a truth that is irresistibly given from the outside, a bolt from the blue.⁷¹

The affirmation of an indissoluble bond tying together religion's unique value, vulnerability, and danger is, in addition to its inherent plausibility, the perspective on religion that is best able to explain the unique balance of burden and benefit scholars have observed at the heart of the religion

71. See *Acts* 9:3-6 (new rev. standard ed.) (describing St. Paul's conversion on the road to Damascus).

clauses.⁷² If, for example, religion were uniquely valuable and vulnerable without being potentially dangerous, it would be difficult to understand the Establishment Clause restrictions on the state's explicit endorsement and inculcation of religious faith.⁷³

Conversely, if religion were simply dangerous and vulnerable, without being uniquely valuable, it would be difficult to understand why the state should not be able to use the means at its disposal (e.g., public education or direct government speech) actively to discourage religious faith. Vulnerability would not, without more, justify the requirements of equal regard that Eisgruber and Sager advocate, particularly when we trace the ultimate origins of that vulnerability to its source in the dangerousness of religious thought itself. Discouraging all religious activity equally would be a very effective means of reducing the vulnerability of minority religious groups, but only at the cost of discouraging religious activity in general. By balancing the unique vulnerability and danger of religion, on the one hand, against its unique value, on the other, we can make better sense of the Constitution's delicate tightrope.

A religion jurisprudence that recognized the unique value of religion would likely favor a broader scope for free exercise exemptions than exists under the Court's current miserly approach. The present presumption of validity enjoyed by regulation burdening religion, for example, would be much harder to sustain. If religion were viewed as uniquely precious, neutral regulations in the service of trivial state goals that had the unmistakable effect of severely harming the expression of particular religious communities would not be given the benefit of the doubt. A jurisprudence that attached unique value to religion would require something much closer to the pre-*Smith* state of affairs, which, whatever the actual results religious claimants were able to achieve, at least attempted to strike a balance between the importance of government interests served by a regulation and the burden it imposed on religious practices.

CONCLUSION

Justice Stevens is not the antireligious crank that scholars sometimes make him out to be. A careful look at his voting in religion cases suggests that he has a healthy respect for religious thought, although this respect is tempered by a fear of the divisive power of religious disputes in public life. Despite his sensitivity to the very real dangers posed by religious divisions, he appears to place excessive faith in the ability of the majoritarian political process to take into account the interests of minority faiths. Moreover, his jurisprudence fails to strike the proper balance between the danger posed by religious majorities and the unique value of religious belief systems in the

72. See generally Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 Yale L.J. 1611 (1993).

73. Of course, on this view, Establishment Clause restrictions might be viewed as a means of protecting religion from the state, and not vice versa.

lives of human beings. A view of religion that took into account the singular value of religious systems of thought, combined with a greater openness to judicial involvement in the process of exempting religious groups from generally applicable regulations, would better reflect the careful balance of the religion clauses and better protect the interests of religious dissenters.